

BEFORE THE
OFFICE OF THE SECRETARY
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

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|---------------------------------|------------------------|
| Request for Comments Regarding) | |
| Implementation of Rural) | Dockets OST 2003-14694 |
| Service Improvement Act) | and OST-2003-14695 |

COMMENTS OF ALASKA CENTRAL EXPRESS, INC.

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The Department has requested comments regarding the implementation of the Rural Service Improvement Act of 2002 (the "Act"). See, Request for Comments Regarding Implementation of Rural Service Improvement Act, Dockets 14694 and 14695 ("Notice"). Alaska Central Express, Inc. ("Alaska Central") urges the Department and the Postal Service to first complete the necessary implementation process as required by the Act before applying the provisions of 39 U.S.C. §5402(h) in tendering bypass mail. Until such implementing steps are completed, the Act would not permit carriers to receive mail tender based on the selection criteria contained in §5402(h). In further support hereof Alaska Central states as follows:

1. Before commenting on some of the implementation issues raised by the DOT in its Notice, Alaska Central wants to state for the record that the Act is an unfortunate piece of special interest legislation crafted to benefit only a select number of mainline and bush carriers, while literally legislating other carriers out of business, or at least a

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major portion of their business. The Act is striking in its Rube Goldberg type construction making it a very cumbersome Act to understand or, as undoubtedly the DOT and USPS will discover, to fully and faithfully implement. Disputes over the provisions of the Act will engender controversy and litigation as carriers object to what may be perceived as arbitrary decisions on the part of the DOT and USPS as they struggle to execute the complicated and inartfully drafted provisions of the Act.

The Act's detailed provisions, that are more characteristic of regulation than legislative language, are already the subject of a judicial challenge based on constitutional grounds. If the challenge is successful, the time-consuming implementation steps being taken by the carriers, the Postal Service and the DOT may be for naught. It is unfortunate that the sponsors of this ill-considered legislation did not consider how disruptive and costly this implementation process will be when passing a law that fundamentally alters the competitive landscape without any overriding social or public policy benefit.

2. The Rural Service Improvement Act plainly favors only four incumbent mainline carriers, three of which transport only cargo and mail, even as the Act proclaims a policy

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favoring the development of passenger carrier service in rural Alaska. Although the Postal Service has historically complained about the level and reasonableness of the DOT-set mail rates, the Act grants this preference to carriers whose costs are historically higher than more efficient carriers that will be eliminated from tender by the terms of the Act.

In addition, the bush carriers that offer passenger service receive a significant preference in the tender of bypass mail, thereby reducing the number of carriers serving rural Alaska. The overall effect of implementation of the Act will be to limit competition in both bush and mainline markets to the detriment of the traveling and shipping public, including the Postal Service. Indeed, the Act is a major break from the airline deregulation philosophy that has formed air transportation policy for over 25 years. It is no wonder that the Act, which contrary to Congressional rules was attached to an unrelated appropriations bill, was never the subject of any substantive hearing. No fact-finding was conducted and no testimony of interested parties was placed on the record. The entire process by which the law was drafted

was accomplished behind closed doors.¹ The bill was written by those who will be protected from competition without any regard for any of the other Alaskan stakeholders interested in safe and competitive air transportation within the State. The Act was promoted by a few high-cost carriers, playing on unfounded USPS concerns about the bypass mail program, that knew that they could not successfully compete in the marketplace. Rather than reform their business practices, they successfully sought legislative shelter that their Senator and Representative were willing to provide.

3. One of the more insidious effects of the Act has been to make Alaska Airlines the de facto monopoly carrier on mainline routes within the State. It does this by limiting the number of carriers eligible for receipt of bypass mail—the revenues which are critical to profitable airline operations within the State. Without the right to carry bypass mail, the single largest category of mail moved within Alaska, new carriers will not seek to compete against Alaska Airlines that will continue to have the support of these mail revenues. Without the threat of possible new entry by carriers wishing

1. The DOT was knowledgeable of the legislative process, and even though no hearings were held, the DOT made no significant effort to consult with the Senate staff about some of the more objectionable features of the Act.

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to compete with Alaska Airlines, it will not face the discipline of the marketplace in setting statewide rates and fares for its services. Without any regulatory controls, Alaska Airlines will be able to exert even greater market power than it could prior to passage of the Act. The DOT should monitor Alaska Airlines' fare actions within the State to detect whether it is using its market power and, if so, to apply §41712 to eliminate any resulting unfair or deceptive practice or unfair method of competition. The State of Alaska is hardly being well served by its Congressional delegation when they support legislation that places the private interests of Alaska Airlines and a few other carriers above the interests of the citizens of Alaska.

4. In the bush markets, the Act also picks winners and losers. The winners are the carriers with substantial participation in the passenger market. Never mind that in many instances passengers and their baggage displace freight traffic, so that at certain times of the year many villages lack adequate freight service to meet the needs of their communities. Nonetheless, this imbalance in service will be perpetuated by the Act's favoring of passenger carriers providing bush service over the carriers that specialize in freight and mail service. Again, the sponsors of the Act

failed to comprehend the implications of the legislation, or if they did, they simply were content to allow the public interest to take a back seat to the private interests of a few.

5. The tenor of the DOT's Notice is indicative of the many issues confronting the DOT, the USPS, the Alaskan carriers and the communities dependent upon their services as the Act is implemented. With layers of preferences requiring detailed reporting of data not normally maintained by Alaskan bush carriers, the DOT is in the unenviable position of gathering the data mandated by the Act and applying it in furtherance of the provisions of the law. There is simply no doubt that this process will not begin to have been properly sorted out within 15 months of enactment after which time the bush related provisions will be legally effective. See §(g)(2) of the Act. However, nothing in the Act requires the DOT or the Postal Service to begin selecting carriers for the carriage of bypass mail based on the provisions of §5402(h)(1) on November 3, 2003 or 15 months from the date of enactment. Before the eligibility of bush carriers for the tender of bypass mail is based on the factors contained in §5402(h), the reporting and use of market share data on which such selections are to be made must be clearly and definitely

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stated and settled. However, as the DOT's Notice states, the T-100 data reported by the carriers is not done on a consistent basis, and depending on the reporting technique used by the carrier, it may be able to "game" the system and report higher market participation rates than is actually the case. With so much revenue at stake, the DOT must first issue firm instructions on reporting requirements and insure through audits and other techniques that these requirements are adhered to by the reporting carriers before the USPS begins to select bush carriers based on this reported data.

6. As the DOT well knows, it cannot simply impose new reporting requirements on carriers without complying with the Administrative Procedures Act ("APA") and announcing its new requirements and allow for comment by interested parties. 5 U.S.C. §553. The instant Notice asks for comments but does not propose any definitive data reporting requirements such that the notice and comments requirements of the APA will be satisfied. Rather the Notice is structured as an advanced notice of proposed rulemaking seeking only preliminary comments on which a formal NPRM would then be based. The DOT must complete the data collection process in accordance with the provisions of the law before carriers can be selected for tender of bypass mail based on market share data which is not

currently and consistently reported.

Accelerating this process and declaring carriers eligible for the tender of bypass mail on flawed data would only compound the negative aspects of the Act and must be avoided. There is no provision of the Act that requires the Postal Service to begin selecting bush carriers on the basis of the selection criteria in §5402(h) before the required market share data and other reporting issues are fully and finally resolved. See Notice, items First, Second, Third, Forth, and Eight, which highlight some of the practical problems associated with DOT implementation of the Act. To do so will undoubtedly cause ineligible carriers to be provided favored treatment while other qualified carriers are deprived of their fair and equitable share of the mail. Nothing in the Act compels such a result. Indeed, to make tender decisions on the basis of flawed or incomplete data would be contrary to the provisions of the Act.

7. A solid statistical basis must be established as specified in the Act to determine the following carrier attributes (among others) prior to the Postal Service implementing bush market tender on the basis of the Act's selection criteria:

- Whether a carrier has provided 20% or more of passenger service between any given city pair for

the 12 months preceding the date mail is tendered to it. §5402(h)(1)(B).

- Whether such carrier continues to provide at least 20% of passenger service over such route to continue to be eligible for tender. §5402(h)(2)(A).
- Whether carriers seeking mail tender under §5402(h)(2) provide passenger service with aircraft of qualifying passenger capacity. §5402(h)(2)(A) and (B).
- Whether the carrier has insured all available passenger seats. §5402(h)(2)(C).
- Whether a Part 135 carrier has begun to convert to operations under Part 121 within two years as required by §5402(h)(3) or within 12 months in accordance with §5402(h)(3)(D).
- Whether the carrier's reported T-100 or other specified data submission is accurate (§5402(k)) as verified by the passenger excise tax calculations specified by §5402(h)(5)(A)(I) and (II).
- Whether the calculation of passengers is in accordance with the provisions of §5402(h)(5)(B) which specifies the use of passenger data from scheduled operations in one direction only.

In addition to putting in place the procedures to collect the required data and to be able to determine that it is accurate and reliable, the DOT must also establish new bush mail §5402(h)(6). In addition, the DOT must by law establish bush mail rates based on data collected in accordance with §5402(k) for (i) Part 121 bush passenger carriers, (ii) for Part 135 bush passenger carriers and; (iii) for bush carriers providing passenger service providing water landings. §5402(h)(6)(B)(C)(D). Until all of these implementing steps are accomplished it would not be consistent with the Act were

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the DOT or the USPS to permit bush mail tender to be based on the Act's new selection criteria.

Accordingly, Alaska Central urges the Department and the USPS to first complete the necessary process of implementation of the Act and, until such time, to continue to apply to current mail tender rules. Time is obviously needed to collect and verify the required data and to establish the mail rates in the manner specified in the Act. To fail to first complete the process by which reliable data is collected, verified and then used to make mail tender decisions would not be consistent with the Act which specifically directs only those carriers deemed eligible for bypass mail receive such mail from the Postal Service at the rates to be set in accordance with §5402(a)(6).

Respectfully submitted,

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Dated: June 2, 2003